

110TH CONGRESS
1ST SESSION

S. 2402

To provide for the substitution of the United States in certain civil actions.

IN THE SENATE OF THE UNITED STATES

DECEMBER 3, 2007

Mr. SPECTER introduced the following bill; which was read twice and referred
to the Committee on the Judiciary

A BILL

To provide for the substitution of the United States in
certain civil actions.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Foreign Intelligence
5 Surveillance Substitution Act of 2007”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act:

8 (1) ASSISTANCE.—The term “assistance”
9 means the provision of, or the provision of access to,
10 information (including communication contents,
11 communications records, or other information relat-

ing to a customer or communication), facilities, or another form of assistance.

(2) CONTENTS.—The term “contents” has the meaning given that term in section 101(n) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(n)).

(3) COVERED CIVIL ACTION.—The term “covered civil action” means a civil action filed in a Federal or State court that—

(A) alleges that an electronic communication service provider furnished assistance to an element of the intelligence community; and

(B) seeks monetary or other relief from the electronic communication service provider related to the provision of such assistance.

(4) ELECTRONIC COMMUNICATION SERVICE PROVIDER.—The term “electronic communication service provider” means—

(A) a telecommunications carrier, as that term is defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153);

(B) a provider of an electronic communication service, as that term is defined in section 2510 of title 18, United States Code;

1 (C) a provider of a remote computing serv-
 2 ice, as that term is defined in section 2711 of
 3 title 18, United States Code;

4 (D) any other communication service pro-
 5 vider who has access to wire or electronic com-
 6 munications either as such communications are
 7 transmitted or as such communications are
 8 stored;

9 (E) a parent, subsidiary, affiliate, suc-
 10 cessor, or assignee of an entity described in
 11 subparagraph (A), (B), (C), or (D); or

12 (F) an officer, employee, or agent of an en-
 13 tity described in subparagraph (A), (B), (C),
 14 (D), or (E).

15 (5) ELEMENT OF THE INTELLIGENCE COMMU-
 16 NITY.—The term “element of the intelligence com-
 17 munity” means an element of the intelligence com-
 18 munity specified in or designated under section 3(4)
 19 of the National Security Act of 1947 (50 U.S.C.
 20 401a(4)).

21 **SEC. 3. SUBSTITUTION OF THE UNITED STATES IN CERTAIN**
 22 **ACTIONS.**

23 (a) IN GENERAL.—

24 (1) CERTIFICATION.—Notwithstanding any
 25 other provision of law, a Federal or State court shall

1 substitute the United States for an electronic com-
2 munication service provider with respect to any
3 claim in a covered civil action as provided in this
4 subsection, if the Attorney General certifies to that
5 court that—

6 (A) with respect to that claim, the assist-
7 ance alleged to have been provided by the elec-
8 tronic communication service provider was—

9 (i) provided in connection with an in-
10 telligence activity involving communica-
11 tions that was—

12 (I) authorized by the President
13 during the period beginning on Sep-
14 tember 11, 2001, and ending on Jan-
15 uary 17, 2007; and

16 (II) designed to detect or prevent
17 a terrorist attack, or activities in
18 preparation for a terrorist attack,
19 against the United States; and

20 (ii) described in a written request or
21 directive from the Attorney General or the
22 head of an element of the intelligence com-
23 munity (or the deputy of such person) to
24 the electronic communication service pro-
25 vider indicating that the activity was—

1 (I) authorized by the President;
2 and

3 (II) determined to be lawful; or

4 (B) the electronic communication service
5 provider did not provide the alleged assistance.

6 (2) SUBSTITUTION.—

7 (A) IN GENERAL.—Except as provided in
8 subparagraph (B), upon receiving a certification
9 under paragraph (1), a Federal or State court
10 shall—

11 (i) substitute the United States for
12 the electronic communication service pro-
13 vider as the defendant as to all claims des-
14 ignated by the Attorney General in that
15 certification; and

16 (ii) as to that electronic communica-
17 tion service provider—

18 (I) dismiss all claims designated
19 by the Attorney General in that cer-
20 tification; and

21 (II) enter a final judgment relat-
22 ing to those claims.

23 (B) CONTINUATION OF CERTAIN
24 CLAIMS.—If a certification by the Attorney
25 General under paragraph (1) states that not all

1 of the alleged assistance was provided under a
2 written request or directive described in para-
3 graph (1)(A)(ii), the electronic communication
4 service provider shall remain as a defendant.

5 (3) PROCEDURES.—

6 (A) TORT CLAIMS.—Upon a substitution
7 under paragraph (2), for any tort claim—

8 (i) the claim shall be deemed to have
9 been filed under section 1346(b) of title
10 28, United States Code, except that sec-
11 tions 2401(b), 2675, and 2680(a) of title
12 28, United States Code, shall not apply;
13 and

14 (ii) notwithstanding any other provi-
15 sion of law, the claim shall be deemed
16 timely filed against the United States if it
17 was timely filed against the electronic com-
18 munication service provider.

19 (B) CONSTITUTIONAL AND STATUTORY
20 CLAIMS.—Upon a substitution under paragraph
21 (2), for any claim under the Constitution of the
22 United States or any Federal statute—

23 (i) the claim shall be deemed to have
24 been filed against the United States under

1 section 1331 of title 28, United States
2 Code;

3 (ii) with respect to any claim under a
4 Federal statute that does not provide a
5 cause of action against the United States,
6 the plaintiff shall be permitted to amend
7 such claim to substitute, as appropriate, a
8 cause of action under—

9 (I) section 704 of title 5, United
10 States Code (commonly known as the
11 Administrative Procedure Act);

12 (II) section 2712 of title 18,
13 United States Code; or

14 (III) section 110 of the Foreign
15 Intelligence Surveillance Act of 1978
16 (50 U.S.C. 1810);

17 (iii) notwithstanding any other provi-
18 sion of law, the statutes of limitation appli-
19 cable to the causes of action identified in
20 clause (ii) shall not apply to any amended
21 claim under that clause, and any such
22 cause of action shall be deemed timely filed
23 if any Federal statutory cause of action
24 against the electronic communication serv-
25 ice provider was timely filed; and

(iv) notwithstanding any other provisions of law, for any amended claim under clause (ii) the United States shall be deemed a proper defendant under any statutes described in that clause, and any plaintiff that had standing to proceed against the original defendant shall be deemed an aggrieved party for purposes of proceeding under section 2712 of title 18, United States Code, or section 110 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1810).

(C) DISCOVERY.—

(i) IN GENERAL.—In a covered civil action in which the United States is substituted as party-defendant under paragraph (2), any plaintiff may serve third-party discovery requests to any electronic communications service provider as to which all claims are dismissed.

(ii) BINDING THE GOVERNMENT.—If a plaintiff in a covered civil action serves deposition notices under rule 30(b)(6) of the Federal Rules of Civil Procedure or requests under rule 36 of the Federal Rules

1 of Civil Procedure for admission upon an
2 electronic communications service provider
3 as to which all claims were dismissed, the
4 electronic communications service provider
5 shall be deemed a party-defendant for pur-
6 poses rule 30(b)(6) or rule 36 and its an-
7 swers and admissions shall be deemed
8 binding upon the Government.

9 (b) CERTIFICATIONS.—

10 (1) IN GENERAL.—For purposes of substitution
11 proceedings under this section—

12 (A) a certification under subsection (a)
13 may be provided and reviewed in camera, ex
14 parte, and under seal; and

15 (B) for any certification provided and re-
16 viewed as described in subparagraph (A), the
17 court shall not disclose or cause the disclosure
18 of its contents.

19 (2) NONDELEGATION.—The authority and du-
20 ties of the Attorney General under this section shall
21 be performed by the Attorney General or a designee
22 in a position not lower than the Deputy Attorney
23 General.

24 (c) LIMITATIONS.—This section, including any Fed-
25 eral statute cited in this section that operates as a waiver

1 of sovereign immunity, constitute the sole waiver of sov-
2 ereign immunity with respect to any covered civil action.

3 (d) CIVIL ACTIONS IN STATE COURT.—For purposes
4 of section 1441 of title 28, United States Code, any cov-
5 ered civil action that is brought in a State court or admin-
6 istrative or regulatory bodies shall be deemed to arise
7 under the Constitution or laws of the United States and
8 shall be removable under that section.

9 (e) RULE OF CONSTRUCTION.—Except as expressly
10 provided in this section, nothing in this section may be
11 construed to limit any immunity, privilege, or defense
12 under any other provision of law, including any privilege,
13 immunity, or defense that would otherwise have been
14 available to the United States absent its substitution as
15 party-defendant or had the United States been the named
16 defendant.

17 (f) EFFECTIVE DATE AND APPLICATION.—This sec-
18 tion shall apply to any covered civil action pending on or
19 filed after the date of enactment of this Act.

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